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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 435

MARGARET JOHNSON, Petitioner,

versus

COMMONWEALTH OF KENTUCKY, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

THEODORE WURMSER,
GARY L. GARDNER,
EUBANKS, GARDNER & SCHAEFER,
Suite 999, Portland Federal Building,
200 West Broadway,
Louisville, Kentucky 40202.

Attorneys for Petitioner.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Margaret Johnson, hereby petitions for a writ of Certiorari to review the decision of the Court of Appeals of the Commonwealth of Kentucky refusing to suppress evidence seized without a search warrant from an automobile in which petitioner had been a passenger prior to her arrest and further prays that this Court apply *Chimel* v. *California*, 395 U. S. 752, retroactively to all cases subject to direct review by this Court on the date of that decision.

OPINION BELOW.

The opinion of the Court of Appeals of the Commonwealth of Kentucky is appended hereto as Appendix A, and is officially reported at 446 S. W. 2d 570.

JURISDICTION.

The order and final judgment sought to be reviewed was decided and filed April 24, 1970. The statutory provision believed to confer on this Court's jurisdiction to review the final order and judgment in question is 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the search and seizure limitations contained in the Fourth Amendment to the United States Constitution as announced by this Court in *Chimel* v. *California, supra,* are to be applied retroactively to those cases subject to direct review on the date of this Court's rendition of those pronouncements?

2. Whether a search of an automobile and seizure of evidence contained therein without a search warrant when the occupants are arrested outside the automobile and are no longer in the immediate vicinity of the vehicle and the police officers are exercising complete dominion and control over the automobile is "unreasonable" within the meaning of the Fourth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment IV, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated,

and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE.

On June 10 and 11, 1968, petitioner, Margaret Johnson, three other colored females and one colored male were tried and convicted of grand larceny before a jury of the Hardin Circuit Court in the Ninth Judicial District of the Commonwealth of Kentucky. Only petitioner, Johnson, questions the constitutionality of certain portions of those proceedings, namely, the failure of the trial court to suppress certain evidentiary items.

The arrest of petitioner occurred on April 16, 1968, in Radcliff, Kentucky, effected by two Radcliff police officers who had monitored a radio transmission that five (5) colored suspects traveling in a yellow cadillac convertible were wanted in connection with the disappearance of wearing apparel a short time before from clothing establishments in Elizabethtown, Kentucky, located a few miles from Radcliff along highway U. S. 31-W.

Upon stopping the cadillac automobile bearing the five (5) suspects, the police removed them from the vehicle authenticated the operator's license and ownership of the car of the male driver and placed the occupants under arrest. After the offices had returned to the cadillac and upon searching the interior of the automobile discovered a pillow case located in the "boot

or well" of the convertible which had clothing stuffed into it. After the parties arrived at the Radcliff police station the contents of the pillow case were dumped out and identified as new articles of clothing with the price tags intact.

POINT I.

This Court's decision in *Chimel* v. *California*, 395 U. S. 752 23 L. Ed. 2d 685, 89 S. Ct. 2034, clarifying the Fourth Amendment limitations on search and seizure should be applied retroactively to those cases subject to direct review on the date of the Court's pronouncement. This presents a substantial constitutional question not heretofore determined by this Court.

Following this Court's determination of the basic constitutional issues in *Chimel* v. *California, supra,* the issue of retroactive application was left unanswered to date. *Von Cleef* v. *New Jersey,* 395 U. S. 814; *Shipley* v. *California,* 395 U. S. 818; *Vale* v. *Louisiana,* decided June 22, 1970. Thereafter, the Court further avoided the issue of retroactive application by denying certiorari in six cases pending on the date *Chimel* was decided. See dissent of Justice White, *Shipley* v. *California,* 395 U. S. 818, at 822.

The granting of retroactive application of this Court's decisions and the extent thereof has been categoricaly resolved by (a) complete denial, *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964); (b) limiting the application only to the case in which the rule was announced, *Halliday* v. *United States,* 394 U. S. 931 (1969); *Desist* v. *United*

States, 394 U. S. 244 (1969); (c) granting retroactivity to those cases still subject to direct review, *Tehan* v. *United States*, 382 U. S. 406 (1966); (d) full extension of the retroactive effect even to those cases which had been finally adjudicated, *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968). The reasoning employed by Justice Harlan in his dissent in *Desist* v. *United States*, *supra*, at 260, appears to aptly summarize the lack of uniform treatment of criminal defendants by the continuance of a lack of consistent approach to retroactivity. To disregard this sound analogy would allow the same arguments to be expounded on the same day in different courtrooms with the final outcome dependent upon who acquires this Court's favor first through the judicial process. The foundation of the legal educational process and the incentive of counsel to advance and maintain stability in the judicial framework require adherence to reasoning and logic and the administration of justice with an even hand. See Justice Douglas' dissent, *Desist* v. *United States*, *supra*, at 258.

Petitioner respectfully submits, than an adherence to sound reasoning and logic results in the inescapable conclusion that any procedures employed by the law enforcement officers in the search of Ted Steven Chimel's home on September 13, 1965, which were repugnant to the Fourth Amendment must necessarily have been tainted with the same repugnance in the case at bar on April 16, 1968.

POINT II.

A search of an automobile without a search warrant when the occupants are arrested outside the automobile and are no longer in the immediate vicinity of the vehicle and the police officers are exercising dominion and control over the automobile and its contents is not contemporaneous with the arrest and is unreasonable within the meaning of the Fourth Amendment standards. The opinion of the State court below is in conflict with applicable federal court decisions and previous applicable decisions of this Court.

The State court below long ago adopted the federal standards of search and seizure. *Youman* v. *Commonwealth*, 224 S. W. 860 (1920).

This Court reiterated its differentiation between a search conducted in regard to a dwelling house and that of objects readily moved such as automobiles in *Preston* v. *United States*, 376 U. S. 364 at p. 366. Cf. *Carroll* v. *United States*, 267 U. S., at 153. This differentiation, however, is premised upon the fact that those to be arrested and searched for weapons or fruits of an alleged crime are exercising some dominion and control over the vehicle and are in close proximity to an area of the vehicle from which a weapon might be obtained. If, however, the occupants of the vehicle have been removed and control of the vehicle has been assumed by the arresting officers at the scene of the arrest, then any justification for a search of the vehicle is removed. *A fortiori* is the result in such cases as complete dominion and control can be assumed and exercised over a movable object by towing the object to site selected by the officers, whereas the same course

could not be followed in the case of a stationary object. When *all* occupants of a moveable object are taken into custody, mobility ceases, *Chambers* v. *Maroney*, No. 830, decided June 22, 1970, and petitioner respectfully submits the *Chimel, supra,* standards are applicable and a warrantless search of the vehicle in the instant becomes *unreasonable* under Fourth Amendment requirements, *Colosimo* v. *Perini*, 451 F. 2d 804 (C. A. 6th Cir. 1969).

CONCLUSION.

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

THEODORE WURMSER,
GARY L. GARDNER,
EUBANKS, GARDNER & SCHAEFER,
999 Portland Federal Building,
200 West Broadway,
Louisville, Kentucky 40202,
Attorneys for Petitioner.

COURT OF APPEALS OF KENTUCKY

GINA IRVIN, ET AL., *Appellants.*

v.

COMMONWEALTH OF KENTUCKY, *Appellee.*

OPINION—Rendered October 24, 1969.

Defendants were convicted in the Circuit Court, Hardin County, J. Howard Holbert, J., of grand larceny, and they appealed. The Court of Appeals, Palmore, J., held that photographs of the stolen property were properly admitted though the stolen property itself was not submitted, and that verbal testimony describing stolen property was sufficient.

Affirmed.

1. Arrest—Key 71.1(8)

Criminal Law—Key 394.4(12)

Where police officers had reasonable grounds to believe that occupants of automobile had committed felony and had fruits of crime in their possession, and where officers were, therefore, authorized to arrest the occupants and to conduct a search of the automobile, validity of the search and admissibility of evidence found did not depend upon whether the arrest had actually been accomplished at the time of search. U.S.C.A. Const. Amends. 4, 14; Const. § 10.

2. Criminal Law—Key 438

In larceny prosecution, photographs of stolen property were properly admitted, though the property itself was not submitted. KRS 432.220.

3. Larceny—Key 58

Larceny could be proved without producing either the stolen property or photographs thereof, and verbal testimony describing stolen property was sufficient. KRS 433.220.

4. Larceny Key 59

Conviction for grand larceny, rather than petit larceny, could be based on evidence of retail prices of stolen goods where witnesses gave both wholesale and retail prices and jury was instructed on both grand and petit larceny. KRS 433.220, 433.230.

5. Criminal Law—Key 723(5)

Remark by prosecuting attorney that defendants had been hiding because they knew the jig was up was not prejudicial, though defendants were black and though "jig" is sometimes used as derogatory term for black people, where it was clear from the context that no such derogatory use of the word was intended.

B. G. Brammell, Radcliff, for appellants.

John B. Breckinridge, Atty. Gen., William O. Gilbreath, Asst. Atty. Gen., for appellee.

PALMORE, Judge.

Gina Irvin, Margaret Johnson, Shirley Phillips, Chalondias Brewer and Charles Edward Brewer were indicted on three counts of grand larceny arising out of the theft of clothing from three retail establishments. KRS 433.220. The Brewers were convicted on two and the others on all three of the counts. They were tried jointly and appeal jointly.

The separate offenses took place on the same day. In each instance it was discovered almost immediately that garments were missing from the display racks and a re-

port was made to the police. The reports described the suspects, some of whom were wearing blonde wigs, and in one case the store personnel and a customer saw the appellants leaving in a yellow Cadillac automobile with a white top and obtained its license number. Armed with this information, police officers very shortly apprehended the automobile and its occupants and recovered the missing garments, all of which were identified and photographed at the police station that same evening.

After the examining trial the stolen merchandise was released to the owners, and at the jury trial the photographs were used by the witnesses for the Commonwealth for convenience in describing the articles in question and testifying as to their respective retail and wholesale prices.

The stolen goods were discovered and seized by the police immediately after they had stopped the Cadillac automobile on the road. There is some question as to (1) whether the stolen goods were openly visible or were discovered pursuant to a search, and (2) whether any of the appellants, including Charles Brewer, the driver of the car, had been placed under arrest when the stolen property was found. Appellants therefore contend that this evidence was obtained in violation of their rights under the 4th and 14th Amendments of the federal constitution and § 10 of the Kentucky Constitution and should have been suppressed.

[1] It was held in the recent case of Johnson v. Commonwealth, Ky., 443 S. W. 2d 20, 23 (1969), that the validity of a reasonable search based on probable cause does not necessarily depend upon an antecedent arrest or search warrant. The facts of that case were quite analogous to those in this case. Here officers had reasonable grounds to believe the occupants of the Cadillac automobile had committed a felony or felonies and had the fruits of the crimes in their possession. Thus they were authorized to arrest the suspects at once, and to conduct a search. Under such circumstances the legal efficacy of a search does

not depend on whether the officers actually had accomplished the arrest they were empowered to make. The trial court did not err in admitting the evidence.

[2] When it became apparent to counsel for the appellants that the Commonwealth was intending to use photographs in lieu of the stolen garments themselves, an objection was raised in which one of the defense lawyers made the remark, "I believe there is a strict admonition that the Commonwealth must keep all this evidence in their possession at all times, and to take photographs would show laxity on the part of the Commonwealth," to which the trial judge responded, "You may take advantage of the laxity if you so desire. I think they may introduce the photographs."

[3] Appellants contend that this reference by the court to the "laxity" somehow reflected an attitude on the part of the judge that they were resorting to trickery. We do not get that impression, and find the point hardly worth mention. They contend also that the photographs were not the best evidence and should not have been admitted. But this is not a fit subject for application of the best evidence rule. The Commonwealth could have proved its case without producing either the stolen property or the photographs. The photographs served merely as a convenient vehicle for refreshing the recollections of the witnesses and in facilitating their descriptions of the stolen garments. Under ordinary circumstances it is entirely unnecessary for the owner of stolen property to be deprived of it while a criminal prosecution is running its sometimes weary course through the halls of justice. If there is any real doubt as to whether the photographs are accurate and do in fact show the articles they are purported to represent, the defendants may indeed, as observed by the trial judge, make the most of whatever "laxity" exists in that respect.

What we have said about the photographs answers yet another contention of the appellants, which is that in the

case of one of the stores, from which four dresses had been stolen, only three photographs were introduced, the other having been lost. Hence, they argue, the fourth dress cannot be counted, and without it the proof falls short of $100, the low watermark for grand larceny. KRS 433.220, 433.230. As we have said, however, it was not necessary to produce either the dress or a photograph; the verbal testimony describing it was alone sufficient.

[4] Appellants make further complaint of the instructions permitting findings of grand larceny based on evidence of the retail prices at which the stolen dresses were being offered for sale, where as the wholesale prices paid for them by the respective merchants did not in any of the three instances aggregate $100. The witnesses gave both the wholesale and retail prices, and one of the owners explained that numerous items of cost go into a retailer's markup. Even, however, without the latter testimony, it is a matter of common knowledge to jurors as members of the general public that a dress cannot be purchased from a display rack in Elizabethtown for what it would bring as part of a manufacturer's or wholesaler's inventory in New York City. The retail price at which an item is offered for sale by a merchant in the ordinary course of business represents an expert's opinion of what it will bring from a willing buyer at that time and place, and a jury is free to accept it as correct. In this case the trial court instructed on both grand and petit larceny, so that if in any of the three instances the jurors entertained a reasoable doubt as to whether the value of the property stolen amounted to $100 they could find the appellants guilty of petit larceny. The instructions were patterned according to the terms set forth in Stanley's Instructions, § 925, and were not erroneous.

[5] The last point is that the Commonwealth's Attorney made an improper and prejudicial remark in his summation to the jury, as follows:

"The testimony of Mrs. Lynch is that when she lookd out the door, this Cadillac was headed that direction, in a northerly direction and only the head of the man driver was showing. Why? Where were the rest of them? They were in Radcliff in the car. Why did they hide if they were not guilty of anything? And why did they say, 'We better go'? Is that an indication of innocence? Because they knew the jig was up. They knew suspicion was on them. They knew Mrs. Lynch was onto them—

Mr. Gardner: Object to the use of the word 'jig.'

The Court: Overruled."

Counsel for the appellants takes the position that the word "jig" was used as a reference to their race and color. Considering the context in which it clearly was used, we cannot believe that any impartial observer could or would draw such an inference. "The jig is up" is an expression very much like and just as commonly understood as "caught red-handed." As thus used we are told by Webster's Third New Dictionary that "jig" means a trick, game or stratagem. We are aware, of course, that sometimes the word is a crude and inexcusable name for black people. It is quite unlikely, however, that a person with the education and statute of a Commonwealth's Attorney in this state would be so callous or obtuse as to employ it in that fashion, especially during the trial of a case, and if he did, no trial judge would hesitate to take appropriate action. The Commonwealth's Attorney and Circuit Judge who participated in the trial of this case are not the type of men who would descend to such bad taste. The only sensible conclusion we can reach is that counsel for the appellants imagines insult where it was both unsaid and unintended.

The judgment is affirmed.

All concur.